

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GREGORY TABAREZ,

Plaintiff,

No. CIV S-04-0360 LKK PAN P

vs.

DIANA BUTLER, et al.,

Defendants.

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with an action filed pursuant to 42 U.S.C. § 1983. Plaintiff's February 19, 2004 complaint alleges that on April 8, 2002, defendants intentionally released incompatible groups of Hispanics to a handball court to instigate a riot and when plaintiff was attacked, defendants failed to protect him.

On September 13, 2005, defendants Diana Butler, Mike Bunnell, David R. Rios and Max S. Lemon filed an answer and on November 17, 2005, defendant Lemon moved for summary judgment.

On January 25, 2006, plaintiff moved to amend his complaint and submitted a proposed first amended complaint identifying three new defendants. On February 1, 2006, defendants Diana Butler, Mike Bunnell and David R. Rios filed a statement of non-opposition to the motion to amend. Defendant Lemon did not respond.

1 The Federal Rules of Civil Procedure provide that a party may amend his or her
2 pleading “once as a matter of course at any time before a responsive pleading is served.” Fed. R.
3 Civ. P. 15(a). Once a responsive pleading is filed, “a party may amend the party’s pleading only
4 by leave of court or by written consent of the adverse party; and leave shall be freely given when
5 justice so requires.” Fed. R. Civ. P. 15(a). Leave to amend is “within the sound discretion of the
6 trial court.” United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981).

7 In addition to the previously-named defendants, the proposed amended complaint
8 alleges defendants Acuna, Baber and Reardon deliberately failed to follow a plan to gradually
9 release Northern and Southern Hispanic inmates to the yard knowing this posed an unacceptable
10 risk of harm to plaintiff.

11 Good cause appearing, plaintiff’s January 25, 2006 motion to amend the
12 complaint will be granted. Defendant Lemon’s November 17, 2005 motion for summary
13 judgment will be denied without prejudice as it is premature and directed toward the now
14 superseded complaint.

15 The amended complaint states a cognizable claim for relief pursuant to 42 U.S.C.
16 § 1983 and 28 U.S.C. § 1915A(b) against the following defendants: Butler, Bunnell, Lemon,
17 Rios, Acuna, Baber and Reardon. If the allegations of the amended complaint are proven,
18 plaintiff has a reasonable opportunity to prevail on the merits of this action.

19 In accordance with the above, IT IS HEREBY ORDERED that:

20 1. Service is appropriate for the following newly-named defendants: Acuna,
21 Baber and Reardon.

22 2. The Clerk of the Court shall send plaintiff three USM-285 forms, one
23 summons, an instruction sheet and a copy of the amended complaint filed January 25, 2006.

24 3. Within thirty days from the date of this order, plaintiff shall complete the
25 attached Notice of Submission of Documents and submit the following documents to the court:

26 a. The completed Notice of Submission of Documents;

b. One completed summons;

c. One completed USM-285 form for each defendant listed in number 1 above; and

d. Four copies of the endorsed amended complaint filed January 25, 2006.

4. Plaintiff need not attempt service on defendants Acuna, Baber and Reardon and need not request waiver of service. Upon receipt of the above-described documents, the court will direct the United States Marshal to serve the above-named defendants pursuant to Federal Rule of Civil Procedure 4 without payment of costs.

5. Defendants Lemon, Butler, Bunnell and Rios are granted thirty days from the date of this order in which to file an answer to the amended complaint.

DATED: March 9, 2006.

John F. Winkler
UNITED STATES MAGISTRATE JUDGE

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NOTICE OF SUBMISSION
OF DOCUMENTS

_____/

Plaintiff hereby submits the following documents in compliance with the court's
order filed _____:

_____ completed summons form

_____ completed USM-285 forms

_____ copies of the _____
Amended Complaint

DATED:

Plaintiff